Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 111

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
APR 07 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**CAUSE NO. A 05 CA 334 SS**
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Fulbright.	§	

NOTICE TO SUPPLEMENT PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT

TO THE HONORABLE COURT:

COMES NOW Plaintiffs Immunocept, LLC, Patrice Anne Lee, and James Reese Matson (collectively "Plaintiffs") and pursuant to Federal Rule of Civil Procedure 15(d), file this Notice to Supplement Plaintiff's Motion to Alter or Amend the Judgment and would respectfully show the court as follows:

On April 6, 2006, Plaintiffs filed Plaintiffs' Motion to Alter or Amend the Judgment (the "Motion") and the Appendix to Plaintiffs' Motion to Alter or Amend the Judgment (the "Appendix"). The Appendix contains exhibits referenced in the Motion.

Exhibit 1 of the Appendix, the Affidavit of Alan MacPherson (the "Affidavit"), has been revised since the filing of the Motion. The revised Affidavit is attached hereto as Exhibit A and replaces the Affidavit in the Appendix.

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Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS
IMMUNOCEPT, LLC
PATRICE ANN LEE
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served *via facsimile* on this the 6 day of April 2006:

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Exhibit 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IMMUNOCEPT, LLC, PATRICE ANN LEE AND JAMES REESE MATSON	§	
Plaintiffs,	§	
v.	§	**CAUSE NO. A 05 CA 334 SS**
FULBRIGHT & JAWORSKI, LLP	§	
Defendant.	§	

AFFIDAVIT OF ALAN MACPHERSON IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

Pursuant to 28 U.S.C. § 1746, Alan MacPherson declares under penalty of perjury as follows:

1. I am a Partner at MacPherson Kwok Chen & Heid LLP having places of business at 2402 Michelson Drive, Suite 210, Irvine, California 92612 and at 1762 Technology Drive, Suite 226, San Jose, California 95110.

2. I have been retained as an expert by Plaintiffs. I understand that the Court has granted summary judgment in favor of Defendants on statute of limitations grounds. I understand that the Court's opinion relied upon several factual assumptions, some of which the Court described me as asserting. These include the following: (1) that mere awareness of the "consisting of" language would have been sufficient to lead a reasonable patent attorney to suspect that negligence in drafting had occurred; (2) that

mere awareness of the narrow scope of the Plaintiffs' patent, U.S. Patent No. 5,571,418 (the "'418 patent") was sufficient to lead a reasonable patent attorney to suspect that negligence in drafting had occurred; (3) that a review of the '418 patent file history and prior art for another purpose would cause the reviewing attorney to discover Fulbright's malpractice; (4) that a patent attorney charged with enhancing a client's patent portfolio necessarily would have had to comprehensively review the earlier-obtained patents in that portfolio; (5) that a patent attorney charged with enhancing a client's patent portfolio had a duty to report details concerning the scope of the earlier-obtained patents within that portfolio to the client, even if that patent attorney was never asked to provide any analysis of the weaknesses or strengths of these patents in that portfolio. I strongly disagree with each of these factual assertions and submit this affidavit to make my opinions clear.

3. My opinions with respect to each of these factual assertions as stated herein are based on a careful review of the facts of this case as well as my substantial experience as a practicing patent attorney. As shown by my CV, attached to my expert report, I have been practicing patent law for more than forty (40) years.

4. I disagree that a mere awareness of the "consisting of" language in the '418 patent would have been sufficient to lead a reasonable patent attorney to suspect that negligence in drafting had occurred. The deposition testimony cited by the Court to support a contrary position was taken out of context, as a closer analysis of the transcript will reveal. (MacPherson Depo at pp.37, 47-48 and 50 attached as Exhibit A). In reality, the mere presence of "consisting of" language in the independent claim of a patent would not cause a reasonable patent attorney to suspect malpractice. The use of this term as a

transitional phrase is unusual, but its presence does not suggest negligence. A reasonable patent attorney discovering this term in a patent's claim language would recognize that it had the effect of significantly narrowing the scope of the patent. But the idea that the language had been inserted unnecessarily and unjustifiably, i.e., negligently, during the prosecution process would not enter the patent attorney's mind based on just seeing this phrase. Rather, the only reasonable assumption to make would be that the use of this phrase had been necessary to avoid prior art cited by the Patent Office. Accordingly, I believe that Tom Felger's mere awareness of the "consisting of" language in the '418 patent would not by itself have given rise to the suspicion that anything was amiss with the patent, necessitating any further analysis.

5. Similarly, I disagree that mere awareness of the narrow scope of the'418 patent was sufficient to lead a reasonable patent attorney to suspect that negligence in drafting had occurred. The deposition testimony cited by the Court to support a contrary position was taken out of context, as a closer analysis of the transcript will reveal. Id. In reality, a mere awareness that the scope of a patent is narrow or even extremely narrow would not cause a reasonable patent attorney to suspect malpractice. Many patents are issued with narrow scope – even extremely narrow scope. But in all but the extremely rare instance where malpractice occurs, the narrowness of their respective scopes would reflect the fact that the patent had to be narrowed to get around prior art. A patent attorney who finds that one of the patents in his client's portfolio is narrow in scope would thus properly assume not that malpractice occurred in its drafting, but rather that some prior art required the patent's resulting narrowness. Accordingly, I believe that Tom Felger's awareness of the narrow scope of the Plaintiffs patent would not by itself

have given rise to the suspicion that anything was amiss with the patent, necessitating any further analysis.

6. I disagree that a review of the '418 Patent file history and prior art for another purpose would have caused Tom Felger to discover Fulbright's malpractice. As I made clear in my deposition, file histories and prior art are reviewed for a number of purposes, some of which have nothing to do with determining the overall effective scope of the patent. (MacPherson Depo at pp. 26-30; 225-29). If one was reviewing the file history and prior art to resolve a narrow issue, the focus would be on that issue. That review would not lead to the discovery of a negligently inserted term, particularly if that term had no relation to the narrow issue you were studying. My understanding is that Felger only carefully reviewed the patent file history and prior art on one occasion, and this review was confined to determining the extent to which the claimed pore size range in the '418 extended downwards and/or upwards to encompass slightly smaller or large pore size filters. As I made clear in my deposition, I do not believe such a review would have led Felger or any other reasonable patent attorney to discover that Fulbright had unjustifiably and unnecessarily, i.e., negligently, inserted the "consisting of" language into the '418 Patent. (Id.)

7. I disagree that a patent attorney charged with enhancing a client's patent portfolio necessarily would have been required to comprehensively review the scope of the claims of the earlier-obtained patents in that portfolio. A patent attorney charged with this task would typically evaluate the existing patents to determine what additional coverage would be useful. If a patent attorney came across a narrowly drafted patent, he

or she would not seek to determine if a mistake had been made during its prosecution. Rather the attorney would try to determine what additional application(s) to file.

8. I disagree that a patent attorney charged with enhancing a client's patent portfolio had a duty to report details concerning the scope of the earlier-obtained patents within that portfolio to the client,. if that patent attorney had never been asked to provide any analysis of the weaknesses or strengths of such patents in that portfolio. If a patent attorney was asked to draft other patents for his client and in the process of drafting these other patents, encountered an existing patent within the client's portfolio that was narrow, he would have no reason – let alone a duty – to inform his client of this fact. The only time a reasonable patent attorney would have a reason to report such a fact to his client would be if such a communication was necessary to carry out the attorney's other assignments. In my more than forty (40) years of practice, I do not recall ever calling a client unprompted and informing the client of my analysis of the scope of the earlier-obtained patents in the client's portfolio, unless the client had specifically requested such analysis. Here, my understanding is that Plaintiffs never requested such analysis of their patent portfolio, including any analysis of the strengths or weaknesses of the '418 Patent. Nor did Plaintiffs, to my understanding, ever ask Felger any questions about the strengths or weaknesses of the '418 Patent. Moreover, as discussed above, in my opinion nothing apparent on the face of the '418 Patent nor any facts which would have been obtained during Felger's performance of the other work assigned him by Plaintiffs, would have caused Felger to suspect that anything was wrong with the '418 Patent. Accordingly, Felger would have had no reason – nor duty – to communicate information regarding the scope of the '418 Patent to his client.

9. My original expert report is attached as Exhibit B to this declaration and I still believe that the matters stated in that report are true and correct.

Alan H MacPherson

Date: April 6, 2006

Alan H. MacPherson

Exhibit A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS - AUSTIN DIVISION

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,

Plaintiffs,

vs. Cause No. A05CA334 SS

FULBRIGHT & JAWORSKI, LLP,

Defendants.

CERTIFIED COPY

VIDEOTAPED DEPOSITION OF ALAN MACPHERSON

DATE: Friday, January 27, 2006

TIME: 9:30 a.m.

LOCATION: MACPHERSON, KWOK, CHEN & HEID
1762 Technology Drive
Suite 226
San Jose, CA 95110

REPORTED BY: AUDREY KOLTERER, CSR NO. 11875

#22798

Advantage ARS Reporting Services, LLC
1083 Lincoln Avenue, San Jose, California 95125, Telephone (408) 920-0222, Fax (408) 920-0188

10:04:25 with the goal in mind of trying to figure out why the
10:04:30 phrase "consisting of" was used before you would come
10:04:33 to any final conclusion.
10:04:34 Q. When you see a patent with the phrase
10:04:36 "consisting of" in it, does that suggest to you that
10:04:41 the file history should be reviewed to determine why it
10:04:44 was used?
10:04:45 A. Not necessarily.
10:04:45 Q. Why not?
10:04:46 A. Depends on why I am looking at the patent.
10:04:50 Usually most of the patents that are looked at by
10:04:53 patent attorneys are looked at for what they disclose
10:04:56 and not for what they claim, unless you are doing a
10:04:58 right-to-use study. And if you are prosecuting
10:05:01 patents, you are usually looking at a patent in the
10:05:06 prior art or the cited by the examiner for its
10:05:08 disclosure.
10:05:09 Q. Is it extremely unusual to see the phrase
10:05:21 "consisting of" in the independent claim of a patent?
10:05:24 A. I don't recall seeing the phrase "consisting
10:05:31 of" in independent claims of patents very often. I
10:05:34 think it's quite unusual.
10:05:35 Q. Does it raise a red flag to you as a patent
10:05:38 attorney when you see the phrase "consisting of" in the
10:05:41 independent claim of a patent?

A. It depends on why I would be looking at the patent whether it would raise a red flag. As I said, again, most of the time when a patent attorney is looking at patents, he or she is looking at the patents not to see what their claims necessarily cover, but to see what their disclosure is for the purpose of determining whether or not the disclosure anticipates and makes some obvious application they are prosecuting.

Q. I guess what I'm trying to get at is, how bad a problem is "consisting of" on its face regardless of, you know, what you are reviewing the patent for? If you notice it, do you say, Ha-ha, this patent is pretty narrow?

A. Certainly when you see "consisting of" and you are focused on that language, if that's the language you are focused on you would say, Well, this patent will only cover what is explicitly set forth following the phrase "consisting of." But the question is: Is that why you are looking at the patent?

Q. Right.

Well, regardless of your purpose in looking at the patent, if you look at Claim 1 and -- is Claim 1 always an independent claim in a patent?

A. Usually it's an independent claim. It's very

10:07:11 little else it could be referring back to --
10:07:13 Q. That's what I'm asking you.
10:07:14 Now if you look at Claim 1 and it has the phrase "consisting of" in it --
10:07:18 A. Uh-huh.
10:07:19 Q. -- and you weren't reviewing it to see what the breadth of claims were, but you see that Claim 1 has "consisting of" in it, you automatically process in your head, This is a fairly narrow patent; is that right?
10:07:36 A. I think that I would recognize that the phrase "consisting of" would limit the scope of the claim compared to what the scope of the claim would be if the phrase "comprising" was used.
10:07:50 Q. And does the "consisting of" language that you would see, does that necessarily say to you that the patent has a significantly reduced value from what it would have had if it had used the term "comprising"?
10:08:06 A. I probably wouldn't be thinking in those terms, in the terms of the value of the patent as I was looking at it. Again, it depends on what my purpose would be for looking at the patent. And if I was looking at the patent to determine its scope of protection or its value, then I would want to look at the file history to see what the reason was for using

10:08:33 the term "consisting of" before I came to any
10:08:36 conclusion.
10:08:36 Q. Tell me why it's important to look at the file history and know what the reason is for using "consisting of."
10:08:42 A. In my mind the reason that that's important is because you have to know what the scope of the prior art was against which the claim was allowed, and therefore, the review of the file history would have to be done for that purpose, at least.
10:09:05 Q. So is it possible that you could have "consisting of" in the independent claim of a patent, but the file history reveals that it's -- it actually doesn't limit the scope of the independent claim that much?
10:09:24 A. I suppose it's possible that the phrase "consisting of" could have been added and have been the only way that the claim could have been allowed, but then you would expect in the file history to find comments by the attorney who amended the claims pointing out why adding that phrase made the claim allowable over the prior art.
10:09:53 MR. GANNAWAY: Object to the nonresponsive portion beginning with, "but then you would expect."
10:10:15 Q. BY MR. GANNAWAY: So if you determine -- you

10:10:22 just said that you might determine from the file
10:10:23 history that adding "consisting of" might have been the
10:10:26 only way to get a claim issued, right?
10:10:29 A. You were talking about a speculative
10:10:31 possibility, and I said yes.
10:10:32 Q. Right. And that's what I'm -- I am talking
10:10:34 about hypotheticals.
10:10:35 But nonetheless, regardless of why someone
10:10:42 had to use "consisting of" language, or even if they
10:10:46 didn't have to use "consisting of" language, you would
10:10:48 know just from looking at the face of the patent that
10:10:51 it was limited, right?
10:10:54 A. It was of less of a scope than it would have
10:11:01 been if the word "comprising" was used. I think that
10:11:06 probably that's -- that's a conclusion you could come
10:11:10 to just based on looking at the claim.
10:11:14 Q. Now you earlier, a few questions ago, were
10:11:18 talking about -- you could look at the file history and
10:11:22 determine for what reason the "consisting of" language
10:11:26 was added and if it was necessary based on the back and
10:11:30 forth with the examiner, right?
10:11:32 A. You would look at the file history and hope
10:11:36 that you could find that.
10:11:37 Q. Now that goes to whether or not the
10:11:49 "consisting of" was necessary. But would review of the

10:21:43 A. Well, that I think is correct.
10:21:45 Q. And nothing about reviewing the file history is going to change that fact?
10:21:55 A. Nothing in the file history will change the meaning that's given to the phrase "consisting of" compared to the word "comprising," that is, to the meaning given to the word "comprising."
10:22:14 Q. Nothing in the file history it follows would make you possibly change your opinion about the narrowness of the "consisting of" language in the '418 patent?
10:22:53 A. I think that's correct.
10:23:01 Q. Let me make clear that -- I'm asking the question hypothetically. Before you review the file history, you know that there is nothing in the file history that is going to make the "consisting of" language in Claim 1 seem broader than it is on the face of just the patent itself?
10:23:26 A. I think that's right. The reason I'm hesitating is that the phrase "consisting of" has an established meaning, and when you look at that phrase generally, you look at it in the context of that established meaning.
10:23:45 Q. So if you -- we talked earlier about what you need to review the file history to determine whether it

in the patent area.

Q. So if that's the general rule, when you see "consisting of" in an independent claim of a patent, would you begin with the presumption that some sort of negligence has occurred?

A. I can't recall having seen the phrase "consisting of" other than the '418 patent at the moment, but again, it depends on why I am looking at the patent. As I said, most of the time when we're looking at patents, we are not looking to determine the claim coverage unless we are doing a right-to-use study; then, of course, we would look at the phrase "consisting of" and why it was added. But before I jump to any conclusions, what I do is I -- as I say, I look at the prosecution history.

Q. Well, again -- but you have said that the prosecution history doesn't impact the fact that "consisting of" limits the patent, right?

A. That's true.

Q. So you know from looking at the face of the patent that it's limited by the "consisting of" language, right?

A. That is correct.

Q. And you can't imagine many circumstances when it makes sense to use "consisting of"?

A. That's correct.
Q. So if you are looking at the Claim 1 and see "consisting of," then there is probably some sort of negligence in your opinion, right?
A. Negligence is the conclusion that is a final conclusion, I should say, in this situation. So before I jump to a final conclusion, I'm just careful and I look at the file history to see if there are some explanation that I may not be able to imagine. I don't pretend to know all reasons why all people do all things, and so I would just be careful.
Q. Well -- and I understand you would be careful and look at it, but you want to be careful and look at, at the file history, after seeing "consisting of" in Claim 1 because it's tough for you to imagine a good reason for doing that, right?
A. Yes. It's difficult for me to understand why the phrase "consisting of" may have been put in the claims; that's correct.
Q. And I'm not talking about the '418 here.
A. I understand.
Q. I'm talk in general. So in general, if you see a Claim 1 that has "consisting of," you would want to look at the file history because there might be something wrong with the prosecution; is that your

10:44:07 the phrase "consisting of" may have been a mistake. I mean, it could have been any one of a number of reasons that the phrase "consisting of" was used there. So you are asking me to speculate and -- on a hypothetical, and I can't tell you what the actual reasons would be unless we have, you know, a specific situation.

10:44:27 Q. In a general sense, would you say that the use of "consisting of" in Claim 1 of a patent would drastically limit the scope of the patent?

10:44:41 A. I think I've said that I believe that's the case.

10:44:43 Q. And you don't need to look at a file history to determine that that's a drastic limitation?

10:45:00 A. I would look at the file history to confirm that conclusion.

10:45:04 Q. But you are confirming a conclusion that you had from the face of the patent, right?

10:45:09 A. I'm confirming initial impression.

10:45:18 MR. TILLOTSON: I'm sorry. I didn't mean to interrupt you, but when you reach a stopping point could we just take a short rest room break?

10:45:24 MR. GANNAWAY: Sure. I am getting there.

10:45:26 MR. TILLOTSON: Okay.

10:45:26 Q. BY MR. GANNAWAY: Does it make a difference whether the "consisting of" phrase is used in a

17:19:29 was properly prosecuted and to determine whether or not
17:19:32 the limitations added to the claims were unnecessary.
17:19:36 Is that your opinion?
17:19:37 A. I've said that.
17:19:39 Q. Is it your opinion?
17:19:40 A. I agree with it.
17:19:41 Q. If a patent attorney were to review the file
17:19:48 history of the '418 patent, would they be able to
17:19:57 determine whether or not the limitations added to the
17:20:00 claims were unnecessary?
17:20:01 A. Well, I think we went through this this
17:20:10 morning, and I said that, you know, in reviewing the
17:20:14 file history of the '418 patent I came to the
17:20:17 conclusion that the addition of the phrase "consisting
17:20:24 of" was unnecessary and that, you know, you might want
17:20:31 more information. But based on what I saw in the file
17:20:34 history, I came to that conclusion.
17:20:35 Q. Okay.
17:20:36 And you don't think that you require 40 years
17:20:41 of patent prosecution experience to make that
17:20:46 determination, do you?
17:20:52 A. (Laughing.)
17:20:53 Q. In other words, most patent attorneys would
17:20:56 recognize what you recognized on reviewing the file
17:20:59 history?

17:21:00 A. Well, I think the question is: Why were they reviewing the file history? I mean, that's out of context. You review file histories for a lot different reasons, and you may be reviewing the file history for something that has nothing to do with the issues that we're talking about here. So I can't say that any file -- any attorney reviewing the file history would necessarily come to a conclusion that the amendment was unnecessary.

17:21:27 Q. You would have to essentially be reviewing the file history for -- to determine for what purpose amendments were made and what prior art was being overcome? Is that one of the -- one of the ways that you would make such a determination?

17:21:46 A. I suppose if you were asked to review a patent and were told that one of the things that you were to come up with was whether or not the scope of the claim was proper, and you were given a budget for this and you then went through and did it, you would then come up with a conclusion of some sort. But we just don't go through file histories at the spur of a moment; that's a lot of work. And you have to have some focus and some direction as to the purpose for which you are going through the file history.

17:22:33 Q. Well, I will give you an example. We talked

17:22:36 earlier about making a determination of whether this 90 kilodalton competing filter would infringe the '418; do you remember that discussion?

17:22:47 A. Yes, I remember when you discussed that.

17:22:48 Q. If you are reviewing the file history to make a determination of whether that would be an infringing product, would you notice the factors that you say give rise to the limitations of the '418 patent?

17:23:04 A. I think if you're just looking at the pore size and the 100,000 to 150,000 Daltons, you might very well conclude that that claim was strong in the sense that the pore size elements of the claim would perhaps cover the 90,000. When we talked I said I had no opinion on that. But you might very well conclude that under the Doctrine of Equivalence, or based upon the -- [inaudible] -- statistical distribution of the 90,000 pore-sized filter, that the -- at least the pore size portion of that claim was in good shape, that it would extend and cover that 90,000 pore-sized filter. But you might not look at the "consisting of" language in that context, you might just be looking at the pore size to come to that conclusion.

17:24:02 Q. So you would read Claim 1, '418, which contains the 100 to 150 kilodalton reference, and that's how you determine what -- what was the core

17:24:13 claimed pore size, right?
17:24:15 A. Just looking at the pores. Just looking at the pore size, it says 100,000 to 150,000 Daltons as the molecular weight exclusion; that's correct.
17:24:25 Q. And when you read Claim 1 to determine what pore sizes claim, you see the consisting?
17:24:32 A. Yeah. You probably see the consisting, but you are focusing on the pore size so you might not look at the real implications of the phrase "consisting of."
17:24:43 Q. So you are looking at -- how many lines does Claim 1 occupy on that page of paper in the '418 patent?
17:24:50 A. Well, it looks like it's six lines, I think.
17:24:55 Q. So you are looking at those six lines to determine whether there -- whether a competitor producing a 90 kilodalton filter would infringe the '418 patent, and the "consisting of" language is contained in those six lines; that you might not notice that adding albumin to the 90 kilodalton filter would make your initial query irrelevant?
17:25:19 A. Well, that might not have been the question that was asked, you see. And if you are asked, What is the strength of my pore size limits here, you look at the pore size, and you might make the assumption that the "consisting of" language was not crucial at that

17:25:36 point because the competitor was just doing hemofiltering of blood with a filter. And so you might not look at the "consisting of" language in that context if you are looking just at the pore size and you have been asked about the effect of the pore size limitations on a 90,000 Dalton filter pore size.

17:25:59 Q. Would you agree in assessing the ability of a competitor to infringe -- pardon me.

17:26:06 Would you agree, in assessing the ability of a competitor to avoid infringing the '418 patent, that the possibility of them building a 90 kilodalton filter to avoid infringement pales in comparison with, in your opinion, their ability to add a small step in parallel and avoid infringement?

17:26:32 A. I can't really answer that question. I would say that if I was asked what is the relationship of a 90,000 Dalton pore size to the claimed range of 100,000 to 150,000 Dalton pore size in Claim 1, I think I would focus on that issue. I don't think that I would probably go to those other issues that you just raised in that question.

17:27:06 MR. GANNAWAY: Okay. Let's take a break.

17:27:09 VIDEOGRAPHER: We are now off the record at 5:27 p.m.

17:31:32 (A short recess was taken.)

I, AUDREY S. KOLTERER, duly authorized to administer oaths pursuant to Section 2093(b) of the California Code of Civil Procedure, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify the truth in the within-entitled cause; that said deposition was taken at the time and place therein cited; that the testimony of said witness was reported by me and thereafter transcribed under my direction into typewriting; that the foregoing is a complete and accurate record of said testimony; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself of the opportunity to sign or the signature has been waived.

I further certify that I am not of counsel nor attorney for any of the parties in the foregoing deposition and caption named nor in any way interested in the outcome of the cause named in said caption.

DATED:
JANUARY 30, 2006

AUDREY S. KOLTERER
CSR No. 11875